The Insignia Case and its aftermath

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In this article, **Tonio Borg** discusses the recent *Insignia* case and its ramifications on the rule of exhaustion of ordinary remedies in constitutional proceedings challenging the validity of a law.

TAGS: Constitutional law; Exhaustion rule; Validity of laws

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1. Introduction

It all began with the Insignia case.[1]

In that case plaintiff company contested the constitutional validity of a law which allowed the Financial Intelligence Analysis Unit (FIAU) to impose hefty administrative penalties on legal or physical persons who do not keep their records in order in the context of the prevention of money laundering.[2] The argument put forward by the plaintiff company was that in the light of the *Federation of Estate Agents* case[3] and the case of *Rosette Thake*,[4] hefty administrative fines were, in spite of their being called administrative, still criminal in nature and, therefore, subject to the norm contained in Article 39(1) of the Constitution that only a court of law could impose such sanction. FIAU was not a court of law.[5]

Strangely, the defendant FIAU pleaded that plaintiff company should have first exhausted its remedy under ordinary law; namely, that of waiting for the outcome of an appeal filed from the decision of the FIAU before the Court of Appeal in its inferior jurisdiction in terms of Article 13A of the Prevention of Money Laundering Act.[6] This was a strange plea because only the courts of constitutional jurisdiction can decide cases of constitutional validity of laws, not an ordinary court. Indeed, the Constitutional Court has been extremely jealous to retain such exclusive competence in human rights cases to the extent that in cases of judicial review of administrative action under Article 469A of Chapter 12 of the Laws of Malta, it has ruled[7] that, in spite of the express wording of the law in Article 469A(1) to the effect that an administrative act could be declared *ultra vires* if in breach of the Constitution, such provision did not apply to an alleged breach of human rights, for only courts of constitutional jurisdiction enjoy such exclusive power. The reason given was that courts of constitutional jurisdiction have the exclusive competence to decide constitutional cases.

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[1] 175/2021/1 *Insignia Cards Limited vs FIAU*, Constitutional Court 1 December 2021.

[2] There are currently ten pending cases against FIAU regarding the constitutional validity of the law empowering it to impose punitive administrative penalties. These are 212/2020 *MPM Capital Investments Ltd vs FIAU*; 114/2021 *Vivaro Ltd vs FIAU*; 129/2021 *Credence Corporate and Advisory Services Ltd vs FIAU*; 175/2021 *Insignia Cards Limited vs FIAU*; 394/2021 *Lombard Bank PLC vs FIAU*; 579/2021 *Truevo Payments Ltd vs FIAU*; 11/2022 *Roderick Caruana vs FIAU*; 51/2022 *Phoenix Payments Ltd vs FIAU*; 121/2022 *Southern Cross SICA vs FIAU*; 247/2022 *N Trust Ltd. vs FIAU*.

[3] 87/2013/1 *Federation of Estate Agents vs Director General (Competition) et*, Constitutional Court 3 May 2016.

[4] 25/2017/1 *Rosette Thake noe et vs Electoral Commission et*, Constitutional Court 8 October 2018.

[5] See *Police vs Emmanuel Vella*, Constitutional Court 28 June 1983: '*It therefore appears clear from the entirety of the provisions of this Part that who drafted the Constitution by the word "court" wanted such term to mean only the Superior Courts and Inferior Courts, and that the Superior Courts be composed of judges and the Inferior Courts of Magistrates, and of no one else*'.

[6] Chapter 373 of the Laws of Malta.

[7] 1/2003/1 *Christopher Hall vs Director Social Accommodation et*, Constitutional Court 18 September 2009.

If that is so, *multo magis* only a court of constitutional jurisdiction could decide whether a public authority established by law could impose one million euro fines on individuals and companies!

Indeed, it is important to point out that in this respect Article 39 of the Constitution affords a better protection than the European Convention on Human Rights which allows an adjudicating authority, besides a court, to decide criminal cases. Our Constitution for historical reasons[8] does not permit this. However, even if one were to close one eye and apply only the provisions of the European Convention on Human Rights, Article 6 of the Convention makes it clear that such adjudicating authority has to be *independent and impartial*. A cursory look at the composition of the FIAU and the security of tenure of its members or the lack of it, makes it clear that it does not fit such description.

Indeed, a similar plea had been raised in the *Federation of Estates Agents* case.[9] In that case plaintiff association had challenged the right of the Director General (Competition) to start proceedings against it which could lead to the imposition of a hefty administrative fine. Government pleaded that the Federation had not exhausted its remedies; indeed, it had not even waited for the proceedings to be concluded. Besides, it had the right under ordinary law, namely the Competition Act[10] to appeal to an Appeals Board with a further appeal to the Court of Appeal. If, however, plaintiff association was challenging the very validity of such proceedings, how could it proceed with pursuing unconstitutional, and therefore potentially invalid, proceedings before filing its constitutional application? The Court stated:

> *As to the second plea, namely the one stating that the plaintiff's action had been instituted before time, it is the law itself, namely articles 12A, 13, 13A and 21 of Chapter 379 which is being challenged.* Ergo *a charge in terms of the law namely Chapter 379, which has not been withdrawn which runs counter to Article 39(1) of the Constitution of Malta, breaches the fundamental rights of the plaintiff association with immediate effect. Besides, according to Article 46 of the Constitution, as well as the corresponding article in the European Convention, namely Article 4(1) of Chapter 319, it is sufficient in an action of a constitutional nature to prove that the rights whose contravention is being alleged are being or are likely to be breached*.[11]

[8] Just before the promulgation of the 1961 Constitution, a Malta Constitutional Commission, headed by Sir Hillary Blood, had proposed in February 1961 that, in view of threats against persons who collaborated with the British colonial authorities during direct colonial rule being arraigned before People's Tribunals, only a court of law could decide criminal cases. See *Report of the Malta Constitutional Commission* (Cmnd 1261, Her Majesty's Stationery Office, February 1961) 27: 'In view of threats of trial by "people's tribunals" (see Appendix G) the provisions of section 21(2) of the Nigerian Constitution might be strengthened by substituting for the word "court" a form of words **confining the jurisdiction to try criminal offences to the existing courts of Malta**'. (Emphasis added).

[9] 87/2013/1 *Federation of Estate Agents vs Director General (Competition) et*, Constitutional Court 3 May 2016.

[10] Chapter 379 of the Laws of Malta.

[11] '*Għar-rigward tat-tieni eċċezzjoni, cioè l-intempestività tal-azzjoni tar-rikorrenti, il-qorti tifhem illi hija l-liġi stess cioè artikolu 12A, 13, 13A, 21 tal-Kap 379 illi qed tiġi impunjata. Ergo akkuża ai termini tal-liġi Kap. 379, akkuża li ma ġietx irtirata, li tikkozza mal-artiklu 39(1) tal-Kostituzzjoni ta' Malta, tilledi d-drittijiet fundamentali tal-*

The Constitutional Court confirmed the judgment of the lower Court stating that:

> […] *it would not be wise that the proceedings before the Director continue when there is a judgment of a court of constitutional jurisdiction which states that such proceedings are in breach of fundamental human rights; and that judgment although not final, would have been reversed not on grounds of merits but on a procedural point; in such a way that the decision finding that a breach of fundamental rights had occurred remains suspended so to say hovering over the proceedings. Once there is already a judicial decision which at least creates* prima facie *a doubt that the proceedings are vitiated, it would be more prudent that such doubt be confirmed or eliminated. Apart from that, in the current case, the proceedings themselves as to how the charge relating to anti-competition activity, independently of the outcome, breaches the right to a fair hearing. These proceedings and the power of the Director remain the same even if the final decision is in favour of the Federation.*[12]*In other words, although it is true that any eventual decision of the Director may be in favour of the Federation, so that it would no longer have any juridical interest in the matter, when one considers that the main grievance of the Federation affects the very proceedings which lead to such decision, and the fact that who filed the charge also decides about the matter, it would not be untimely that the complaint be decided now for even at the end of the proceedings these factors will remain unchanged.*

In *Luigia Attard vs Prime Minister et*[13] the Constitutional Court, in a case where the law establishing the Partition of Inheritances Tribunal was being challenged, stated that:

> *Although it is also true that the judgment which will eventually be delivered by the Tribunal could be in favour of plaintiff who would*

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assoċjazzjoni rikorrenti b'mod immedjat. "Inoltre skond artikolu 46 tal-Kostituzzjoni kif ukoll il-korrispondenti artiklu fil-Konvenzjoni Ewropeja u cioè artikoli 4(1) Kap 319, huwa biżżejjed għall-azzjoni dwar indoli kostituzzjonali li d-drittijiet lamentati jkunu qed jiġu jew x'aktarx ser jiġu miksura'.

[12] '*Ma jkunx għaqli illi jitkompla l-proċess quddiem id-*Direttur *meta hemm sentenza ta' qorti ta' ġurisdizzjoni kostituzzjonali li tgħid illi dak il-proċess huwa bi ksur ta' jeddijiet fondamentali u dik is-sentenza għalkemm għadha mhix finali tkun tħassret mhux għal raġunijiet ta' meritu iżda minħabba punt proċedurali, b'mod illi d-deċiżjoni li sabet ksur ta' drittijiet tibqa' mdendla, biex ngħidu hekk, fuq il-proċess. Ladarba ġà hemm deċiżjoni ġudizzjarja li toħloq għall-inqas dubju* prima facie *li l-proċess huwa vizzjat, ikun aktar għaqli li dak id-dubju jew jiġi konfermat jew jitneħħa Barra minn hekk, fil-każ tal-lum huwa l-proċess innifsu ta' kif issir xilja ta' attività anti-kompetitiva, u kif min jagħmel l-istess xilja għandu wkoll is-setgħa li jiddeċiedi dwarha, illi huwa l-kawża tal-ilment kostituzzjonali. Fil-fatt l-ilment tal-Federazzjoni huwa dwar il-fatt li qiegħed isir dan il-proċess u illi l-proċess innifsu, indipendentement mill-eżitu tiegħu, jikser id-dritt tagħha għal smigħ xieraq. Dan il-proċess u s-setgħat tad-*Direttur *jibqgħu l-istess ukoll jekk id-deċiżjoni finali tkun favur il-Federazzjoni. Fi kliem ieħor, għalkemm huwa minnu illi d-deċiżjoni li eventwalment jasal għaliha d-*Direttur *tista' tkun favorevoli għall-Federazzjoni li għalhekk ma jibqgħalhiex interess ġuridiku fil-kawża tal-lum, meta tqis illi l-ilment ewlieni tal-Federazzjoni jolqot il-proċess innifsu li jwassal għad-deċiżjoni, u l-fatt li min jagħmel ix-xilja jiddeċiedi wkoll dwarha, ma jkunx intempestiv li ilment jitqies minn issa għaliex ukoll fi tmiem il-proċess dawn il-fatturi sejrin jibqgħu invarjati. Barra minn hekk, fil-każ tal-lum huwa l-proċess innifsu ta' kif issir xilja ta' attività anti-kompetitiva, u kif min jagħmel l-istess xilja għandu wkoll is-setgħa li jiddeċiedi dwarha, illi huwa l-kawża tal-ilment kostituzzjonali*'.

[13] 74/2012/2, Constitutional Court 30 October 2015.

> *therefore no longer have a juridical interest in the current litigation - when one considers that the main grievance of plaintiff regards the structural composition of the Tribunal along with the fact that there lies no right of appeal - it would not be premature that such complaint be considered and decided now for even at the end of the proceedings, these two circumstances will remain unchanged.*[14]

Following these ground-breaking cases, a further attempt was made to still retain administrative fines on the spurious ground in one case[15] relating to party financing laws, a decision regarding such fine made by the Electoral Commission, in which Government-appointed members are in a majority, could be appealed from a court of law.

The Constitutional Court decided that *at all stages* of any proceedings leading to punitive administrative penalties any interested person had a right to appear before a court of law, and nothing else; and therefore, even at first instance the Electoral Commission not being a court of law could not impose such penalty even though there lay an appeal to a court of law at second instance from its decision.

2. The *Insignia* Case

This case related to a constitutional challenge against the law empowering the FIAU to impose punitive administrative penalties.

As expected, the defendant, State Advocate, and the FIAU raised the plea that since there existed an appeal from the decision of the FIAU under ordinary law to the Court of Appeal in its inferior jurisdiction, then one has to wait the decision of such Court before proceeding with the constitutional case.

Even though this point had poignantly and expressly been decided by the Constitutional Court in *Federation*, the court of first instance surprisingly upheld such plea.[16] It declined to exercise its constitutional jurisdiction owing to the existence of an alternative remedy under ordinary law. It stated:

> *It is true that the complaints of plaintiff company presented before the said Court (of Appeal) are not of a constitutional nature, as is the case in the current litigation; however, the latter are essentially based on the grievances filed in the appeal before the Court of Appeal in its inferior jurisdiction or are related to them. Consequently, it is to be pointed out that it is only if that Court fails to adequately address its grievances that then the plaintiff company has the right to seek redress before this Court. However, if the Court of Appeal in its inferior jurisdiction*

[14] '*Għalkemm huwa wkoll minnu illi s-sentenza li eventwalment tingħata mit-Tribunal tista' tkun favorevoli għall-attriċi li għalhekk ma jibqgħalhiex interess ġuridiku fil-kawża tal-lum – meta tqis illi l-ilment ewlieni tal-attriċi jolqot il-kompozizzjoni strutturali tat-Tribunal, marbut mal-fatt li ma hemmx dritt ta' appell, ma jkunx intempestiv li dan l-ilment jitqies minn issa għaliex ukoll fi tmiem il-proċess dawn iż-żewġ ċirkostanzi sejrin jibqgħu invarjati*'.

[15] 25/2017/1 *Rosette Thake noe et vs Electoral Commission et*, Constitutional Court 8 October 2018.

[16] 175/2021 *Insignia Cards Limited vs FIAU*, Civil Court (First Hall) 30 July 2021 (Mr Justice Lawrence Mintoff).

> *decides by upholding the complaints of the plaintiff company or addresses them by addressing such grievances of a constitutional nature and/ or arising from the Convention, there would be no further need for the plaintiff company to seek redress before this Court.*[17]

The Constitutional Court thankfully overturned such judgment.[18] It ruled that no court under ordinary law could address the constitutional grievances of plaintiff company since only a court of constitutional jurisdiction can decide on the validity of laws.

It stated that:

> *The fact remains that whatever the outcome of the proceedings which still have to be concluded before the Court of Appeal (Inferior Jurisdiction), what occurred before the FIAU has happened already, and the plaintiff company is complaining that those proceedings in themselves led to a breach of fundamental human rights. Besides, this grievance is directly linked with the complaint by which plaintiff company is challenging the provisions of the Money Laundering Act amongst which that provision by which the FIAU, as a public authority by law is investigator, prosecutor and Court, at the same time. Having made these considerations, the Court has no doubt that plaintiff company is but abusing of the constitutional process and there is no reason why a Court should decline its constitutional jurisdiction owing to the existence of adequate ordinary remedies for the alleged contravention.*[19]

One would have thought that this would have been the final word in this legal struggle. It was not to be. Not only did the defendant FIAU hold on tight to its exhaustion plea in all the other constitutional cases where its power to impose one million euros fines and over was being challenged, but in one case it objected to the case continuing before the Court of Appeal decided an appeal application under ordinary law on the merits of the case.

In *MPM Investments Limited vs FIAU et*,[20] plaintiff company was challenging the law allowing FIAU to impose a hefty administrative penalty. When the State

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[17] '*Huwa minnu li l-lanjanzi li s-soċjetà rikorrenti ressqet quddiem l-imsemmija Qorti mhumiex dawk ta' natura kostituzzjonali li qiegħda tressaq hawn, imma dawn tal-aħħar essenzjalment huma msejsa fuq l-ilmenti li hija għamlet lill-Qorti tal-Appell (Inferjuri) jew huma marbutin magħhom. B'hekk jiġi rilevat li huwa biss jekk dik il-Qorti tonqos milli adegwatament tindirizza l-ilmenti tagħha li mbagħad is-soċjetà rikorrenti għandha d-dritt li tirrikorri lil din il-Qorti. Imma jekk il-Qorti tal-Appell (Inferjuri) tiddeċiedi billi tilqa' t-talbiet tas-soċjetà rikorrenti, jew tindirizzahom b'mod li ġġib fix-xejn l-ilmenti tagħha ta' natura kostituzzjonali u/jew konvenzjonali, ma jkunx hemm lok aktar li s-soċjetà rikorrenti tirrikorri lil din il-Qorti*'.

[18] 175/2021/1 *Insignia Cards Limited vs FIAU*, Constitutional Court 1 December 2021.

[19] '*Jibqa' l-fatt li jkun x'ikun l-eżitu tal-proċess li għad irid isir quddiem il-Qorti tal-Appell (Ġurisdizzjoni Inferjuri), dak li ġara quddiem l-FIAU seħħ u l-attriċi tilmenta li fih innifsu dak il-proċess wassal għall-ksur ta' jeddijiet fundamentali. Inoltre, dan l-ilment hu direttament konness mal-ilment li bih l-attriċi qiegħda tikkontesta provvedimenti tal-Att Kontra l-Money Laundering fosthom li l-FIAU hu awtorità pubblika li bil-liġi jaġixxi bħala investigatur, prosekutur u Qorti fl-istess ħin. Magħmula dawn il-konsiderazzjonijiet din il-Qorti m'għandhiex dubju li fil-każ in eżami l-attriċi mhijiex tabbuża mill-proċess kostituzzjonali u mhemmx bażi sabiex Qorti tiddeċiedi li ma tqisx l-ilment tal-attriċi minħabba li għandha mezzi xierqa ta' rimedju għall-ksur allegat*'.

[20] 212/2020, Civil Court (First Hall) 15 November 2021 (Mr Justice Grazio Mercieca).

Advocate insisted that the plea of exhaustion be decided before the case continued any further, the court of first instance overruled such objection stating that the appeal proceedings could not have any effect on the constitutional matter. It ruled on 6th May 2021 that:

> *After hearing the parties and having taken into account the teachings of the Constitutional Court in the case of* Rosette Thake vs Electoral Commission *as well of* ***the fact that the eventual outcome of the case pending befor the Honourable Court of Appeal cannot in any way regularise an eventual breach of fundamental rights*** *orders that the case contunies.*[21]

It heard all the evidence on the *constitutional* case and adjourned the case for final judgment for 15 November 2021.

Between the last sitting and the date when judgment was to be delivered, however, the *Insignia* case had been decided on 10 July 2021 where the court of first instance had stated that it would decline to exercise its constitutional jurisdiction.

The Court surprisingly made its own the conclusions of the court of first instance in the *Insignia* case ,and in spite of its previous pronouncements on the matter, it ruled that it would wait until the ordinary remedy was exhausted; although instead of throwing out the case, it suspended the constitutional proceedings until the court of appeal decided the non-constitutional matters. It even stated, contrary to what it had said before:

> *This Court as presided over, religiously follows the rule that no use should be made of the constitutional procedure without first exhausting the ordinary remedies. The practice has become too common in this forum for anyone deciding to institute a constitutional case without realizing that this is a special and exceptional means which should not be wantonly used.*

And then the Constitutional Court overruled and reversed the judgment of the court of first instance in the *Insignia* case.[22]

The *Insignia* saga has served to lay down the principle that when a law is constitutionally challenged, only proceedings before a court of constitutional jurisdiction can offer an adequate remedy. The only instance where the exhaustion plea may succeed in such cases is when before the ordinary courts there is raised an issue whether the law which is being challenged applies to the case or not; in which case only after a court affirming that the law does apply, can

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[21] '*Wara li semgħet il-partijiet ħadet konjizzjoni tat-tagħlim tal-Qorti Kostituzzjonali fl-atti tal-kawża* Rosette Thake vs Kummissjoni Elettorali et *kif* ***ukoll tal-fatt li l-esitu eventwali tal-kawża pendenti quddiem l-Onor. Qorti tal-Appell ma tistax tissana ksur li jista' jkun hemm ta' jeddijiet fondamentali****, tordna l-prosegwiment tal-kawża*'. (Emphasis added).

[22] 175/2021/1 *Insignia Cards Ltd vs FIAU*, Constitutional Court 1 December 2021.

one really file a constitutional case challenging the validity of the law.[23]

It is hoped that this matter is now settled once and for all, in spite of the stock plea raised in the statement of defence by the State Advocate defending government whenever a law challenging the constitutional validity of a law is submitted. Human rights cases should be decided as expeditiously as possible. Allowing respondents to raise pleas which have already been decided by the apex court in Malta serves only to delay proceedings which the very Constitution deems to be urgent, and which should be expeditiously disposed of.

No wonder Giovanni Bonello, in his book *Misinterpreting the Constitution*, accused the courts of constitutional jurisdiction of abusing this exhaustion rule. They exhaust the individual in favour of those who act in breach of the Constitution:

> How often have the powerful got away with human rights abuses in the Maltese constitutional courts and the victims left the court empty handed because "they had failed to exhaust ordinary remedies". Often, I can tell you. The bottom line: the violator is rewarded with impunity, and the victims take home resentment in lieu of redress.[24]

With due apologies to Madame Roland one can state : 'Oh rule on exhaustion, how many crimes have been committed in your name'!

[23] 6/16 *Oliver Agius vs Prime Minister et*, Constitutional Court 26 May 2017.
[24] Giovanni Bonello, *Misunderstanding the Constitution* (BDL 2019) 65.

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